

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SOUTH BAY DAILY BREEZE, A DIVISION OF
SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC.,
Respondent.

On Petition for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Company's extended comment on the unreliability of authorization cards misses the mark.¹ The Board has never asserted that cards are the most reliable indicators of majority status. In fact, when a union claims

¹ It is true, as the Company states, that the Fourth Circuit in *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F.2d 562, indicated disapproval of bargaining orders on the basis of a card majority. But the Fourth Circuit has reconsidered this position and has, subsequent to *Logan*, upheld bargaining orders based on a card majority. *N.L.R.B. v. Schon Stevenson & Co.*, 386 F.2d 551; *N.L.R.B. v. Preiser Scientific, Inc.*, 387 F.2d 143; *N.L.R.B. v. Lifetime Door Co.*, 67 LRRM 2704.

to represent a majority of the employees on the basis of signed authorization cards an employer who has a good faith doubt of that claim ordinarily is privileged to insist that a union verify its claim by winning a Board election.² But it is not privileged to insist upon an election and, at the same time, commit unfair labor practices which render impossible the holding of a free and fair election. In this case the employer engaged in flagrant and pervasive economic coercion, including threats that Guild supporters would not be considered for managerial positions and would be black-balled from the entire newspaper industry. Such conduct, we submit, makes a sham of the electoral process. In such circumstances, the authorization cards, rather than an election, become the best evidence of majority status; it is not for the employer to complain about the use of cards when his own actions have made their use necessary.

As outlined in the Company's brief, some courts of appeals have recently adopted a somewhat different standard than the Board's *Cumberland Shoe* doctrine (see 351 F.2d 917 (C.A.6)). Thus in *N.L.R.B. v. S. E. Nichols*, 380 F.2d 438 (C.A. 2), the Court stated that it would not look to see if the word *only* was used but rather whether "the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." In this case the Trial Examiner, relying on *Cumberland Shoe*, referred only to testimony required under that doctrine. We submit, however, that the cards here can be sustained under the *Nichols* standard as well. The portions of the record relevant to this standard are referred to at pp. 34-38 of our main brief. That testimony shows that in no case did an employee sign a card in reliance upon a representation that the Guild could not be recognized without an election. Rinehart, Peterson³ and

² See *Aaron Brothers*, 158 NLRB 1077, 1078-1080; *Textile Workers Union (Hercules Packing Corp.) v. N.L.R.B.*, 386 F.2d 790 (C.A. 2).

³ The Company objected to Peterson's card before the Board but does not pursue its objection here.

Gray clearly indicated that they understood that the Guild could be recognized without an election.⁴ The testimony of Baylor and Erickson is somewhat ambiguous and does not make out a case of clear misrepresentation as to the purpose of the card.⁵ Only in the case of Cole was there evidence that he was led to believe that the Guild would not be recognized without an election. There was other evidence, however, that Cole signed the card because he wanted the Guild to represent him and was not induced to sign because of the misrepresentation. Most notable is his admission that he actively campaigned on behalf of the Guild in early stages of the election campaign shortly after he signed the card.

2. There is nothing inconsistent, as the Company suggests, in the Board's contentions that the Company can neither relitigate nor obtain judicial review of the Regional Director's finding as to the makeup of the unit. The Company's contention is based upon its refusal to acknowledge that two entirely separate issues are presented. First is the issue of relitigation which is controlled by Section 102.67(f) of the Board's Rules and Regulations which states that "... Failure to request review [or denial of a request for review] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." As shown in our main brief, pp. 24-26, the representation and unfair labor practice proceedings were related within the meaning of the rule. The cases cited by the

⁴ Rinehart's activities on behalf of the Guild belie the Company's implication that he did not intend to have the Guild represent him and only signed the card because he wanted an election.

⁵ In evaluating such testimony, it is important to take into account the considerations mentioned recently by the District of Columbia Circuit in *United Automobile Workers (Preston Products Co.) v. N.L.R.B.*, 66 LRRM 2548, 2552 (see p. 33 of our main brief) and also the fact that the employees here were college educated newspaper reporters who read and signed a clear and unambiguous authorization card.

Company⁶ are readily distinguishable (See our main brief, p. 26, n. 26). In both cases the issue sought to be relitigated, (supervisory status) was raised for an entirely different purpose in the unfair labor practice case than in the representation case. Here, the Company sought to introduce the same evidence in order to litigate the same issue for the same purpose. As we show in our main brief (pp. 24-26), there is no reason in law or policy to impose this wasteful procedure on the litigants and the Board.

The next question, which is a separate and independent one, is whether the Regional Director's determination in the representation case is judicially reviewable. Under normal circumstances such a decision would be reviewable. But here the Company chose not to seek review of the Regional Director's determination. Instead, it expressly waived its right to appeal to the Board. Because of this, the election was held according to the terms of the Regional Director's decision. We submit that it is too late at this stage of the proceedings to seek review of that decision. (See our main brief, pp. 27-30.)

3. The Company seeks pre-hearing statements of employees who were not called to testify by the General Counsel. Although relying on the *Jencks* rule, the Company does not refer to any portion of the relevant statute which supports its position; nor are any cases cited in support of this novel contention. Indeed, the relevant section of the Jencks Act itself (which of course is not, technically speaking, applicable to Board proceedings), makes it perfectly clear that there is no merit to the Company's contention:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent

⁶ *Heights Funeral Home, Inc. v. N.L.R.B.*, 385 F.2d 879 (C.A. 5); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 365 F.2d 898 (C.A.D.C.).

of the Government shall be the subject of subpoena, discovery or inspection *until said witness has testified on direct examination* in the trial of the case.

18 U.S.C. 3500(a). (emphasis supplied.)

The Company seeks to avoid the clear wording of the statute by the unsupported assertion that the introduction of authorization cards is tantamount to having the signer testify. This kind of contention has been rejected wherever it has been raised. *United States v. Gordon*, 158 F. Supp. 207, 209 (N.D. Ill.); *United States v. Neverline*, 266 F.2d 180 (C.A. 3).

Nor is there any merit to the Company's assertion that it was impossible fully to obtain the facts. The Company could have taken pre-hearing statements from any of the employees if it had wished and it was free to call the employees to testify at the hearing. Indeed, it did call eight of the nine employees whose statements it is seeking and obtained their testimony under oath. The contention that it was entitled to more than this is, we submit, without substance.

4. The Company seeks to exclude a document, General Counsel's Exhibit No. 18, which an employee, Gillis, took from the desk drawer of City Editor Berman. Gillis had a copy made of the document and gave the copy to Schrader, international representative for the Guild, who later turned it over to the General Counsel. There is no evidence that the General Counsel, or Schrader, had any part in the taking of the document or even knew how it had been obtained.

It has long been the general policy of the Board, with respect to allegedly stolen documents, to conform its practice to federal law. *Andrew Jergens Co.*, 27 NLRB 521; *Air Line Pilots Association*, 97 NLRB 929; *General Engineering, Inc.*, 123 NLRB 586.⁷ It is a well-settled principle of

⁷ *Hoosier-Cardinal Corporation*, 67 NLRB 49, relied on by the Company is not to the contrary because there the Board agents were intimately involved in the illegal activities.

federal law that the Fourth Amendment protects against unreasonable seizures by *governmental* agents and does not affect the actions of private parties. *Burdeau v. McDowell*, 256 U.S. 465; *Evalt v. United States*, 359 F.2d 534, 542 (C.A. 9). Every case cited by the Company included either federal or state involvement in the seizure and are thus not applicable to the present situation. The decision in *Elkins v. United States*, 364 U.S. 206, extending the protection of the Fourth Amendment to cover the activities of state governmental agents, is no authority for the Company's contention that *Burdeau* has been overruled. Indeed, *Burdeau* was not even cited in the *Elkins* opinion. Moreover, there are numerous decisions after *Elkins* in which the rule of *Burdeau* has been followed or approved. *United States v. McGuire*, 381 F.2d 306, 313 n. 5 and cases cited therein (C.A. 2).⁸ The Company's reliance on *United States v. Williams*, 282 F.2d 940 (C.A. 6) is misplaced, for in that case the search was carried out by *governmental agents*. Thus, *Williams* has no relevance to *Burdeau* or to this case. In sum, the Company is left with no case which applies the Fourth Amendment to the action of purely private parties.

The Company's contention (Br. 54-56) that application of the exclusionary rule here will serve the purpose of deterrence is based on the assumption that the Union was in some way connected with the seizure. There is no evidence to support this assumption. The mere fact that Gillis solicited authorization cards for two days can hardly raise him to the level of the Guild's general agent. Moreover, there is no basis for the Company's apparent belief that the Guild, absent strong deterrent measures, would not hesitate to engage in widespread illegal searches and seizures.

In any event the introduction of exhibit No. 18 was not prejudicial. The Company points out (Br. 44-55) that on four occasions the Trial Examiner referred to the exhibit when he found a violation. But when the Trial Examiner's

⁸ Accord, *United States v. Goldberg*, 330 F.2d 30 (C.A. 3). Cf. *Barnes v. United States*, 373 F.2d 517 (C.A. 5); *Corngold v. United States*, 367 F.2d 1, 4 (C.A. 9); *Evalt v. United States*, 359 F.2d 534, 542 (C.A. 9).

decision is closely analyzed it becomes apparent that, in each instance, the exhibit was just one of many factors that the Trial Examiner relied on and was merely corroborative of other substantial evidence. Moreover, there were literally a score of other Section 8(a) (1) violations, including extremely coercive economic threats and promises, which were in no way related to or dependent upon exhibit No. 18. Thus, since the exhibit was merely corroborative where referred to and in no way connected with the majority of the violations, it can hardly be considered prejudicial.

CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief we submit the Board's order should be enforced in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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